STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals

RODNEY McCORMICK,

Plaintiff-Appellant,

v

ALLIED AUTOMOTIVE GROUP, INC., Indemnitor of GENERAL MOTORS CORPORATION, and LARRY CARRIER, an individual,

Defendants-Appellees.
_____/

Supreme Court No. 136738

Court of Appeals No. 275888

Genesee Circuit Court No. 06-83549-NI

BRIEF OF AMICUS CURIAE ATTORNEY GENERAL MICHAEL A. COX IN SUPPORT OF DEFENDANTS-APPELLEES' POSITION

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Dated: January 7, 2010

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INTRODUCTION

On August 20, 2009, this Court granted reconsideration and leave to appeal in this case.[1] This Court should limit its examination to whether the Court of Appeals correctly applied *Kreiner v Fischer*, to the facts of this case in determining whether Plaintiff suffered an injury that meets the statutory threshold. If, however, this Court entertains Plaintiff's invitation to reexamine the validity of *Kreiner*, this Court should reaffirm its decision in *Kreiner*. The wisdom and workability of the framework set forth by this Court in *Kreiner* are crucial in applying the Legislature's definition of "serious impairment of body function" in a way that honors the legislative intent to bring balance and stability to Michigan's complex no-fault system by encouraging both uniformity of decisions and sufficiently strict requirements for meeting the serious impairment threshold.

The threshold requirements for a tort action for noneconomic loss are a critical part of the No-Fault Act. It is well-recognized that the goal of the no-fault insurance system was to provide victims of motor vehicles accidents in this State with adequate and prompt reparation for certain economic losses as a trade-off for their common-law remedy in tort.[2] One purpose for this compromise was to reduce litigation in automobile accident cases, thereby reducing the burden on the court system.[3] Another was to avoid overcompensation of minor injuries.[4]

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[1] *McCormick v Carrier,* 770 NW2d 357 (2009).
[2] *Kreiner v Fischer*, 471 Mich 109, 116; 683 NW2d 611 (1994) (quoting *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 NW2d 72 (1978)).
[3] *Shavers*, 402 Mich at 578-579.
[4] *Kreiner*, 471 Mich at 117 (citing *Cassidy v McGovern*, 415 Mich 484; 330 NW2d 22 (1982)).

In 1982, this Court in *Cassidy v McGovern* addressed the proper interpretation of what injuries the Legislature intended would meet the "serious impairment of body function" threshold under the Act.[5] This Court concluded that the Legislature intended both that the question be generally one for the courts rather than a jury, and that the serious impairment threshold be as stringent as the death and permanent disfigurement thresholds.[6] This Court held that the threshold was an objective standard that looked to the effect of the injury on the person's general ability to lead a normal life.[7]

In 1986, this Court in *DiFranco v Pickard* rejected *Cassidy's* interpretation and application of the No-Fault Act's tort-remedy threshold setting forth instead an application of the act that made it significantly easier for plaintiffs to recover for non-economic losses.[8] In 1995, in response to *DiFranco*, the Legislature amended § 3135 of the No-Fault Act,[9] halting the judiciary's expansion of what constituted a threshold injury.

In 2004, this Court decided *Kreiner v Fischer*, which set forth a framework for applying the Legislature's definition of "serious impairment of a body function." Plaintiff contends that *Kreiner* erects hurdles not found in the statutory language, and asks this Court to re-examine and overrule *Kreiner*. This Court should decline this invitation. *Kreiner's* framework supports rather than expands the 1995 statutory amendments, is consistent with legislative intent, and is necessary to the case-by-case determination of whether a plaintiff's injuries meet the statutory threshold for serious impairment. Moreover, the doctrine of stare decisis compels respect for this

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[5] *Cassidy*, 415 Mich at 483.
[6] *Cassidy*, 415 Mich at 503-504.
[7] *Cassidy*, 415 Mich at 504-505.
[8] *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986).
[9] MCL 500.3135.

precedent where, as here, that precedent honors the legislative intent and presents a workable framework for maintaining a balanced no-fault system.

Although Plaintiff invites this Court to overrule *Kreiner,* he provides no viable alternative construction or application of the threshold standard for "serious impairment of body function." His call for a return to *DiFranco's* analysis is not only contrary to the very purpose for the 1995 amendments, but would, in fact, nullify the amendments by sending numerous unwarranted cases to a jury.

INTEREST OF THE AMICUS CURIAE

If *Kreiner* is overruled Amicus Curiae Attorney General Michael A. Cox fears that there will be a dramatic increase in litigation, and ultimately, an increase in the cost of insurance coverage. When the insurance industry's cost of litigation increases, it passes this cost along in the form of higher premiums to Michigan citizens who are required to buy no-fault insurance policies under Michigan's No-Fault Act.[10] Additionally, because the State of Michigan is a self-insured entity,[11] it would likely realize a direct, significant increase in the cost of its litigation and coverage obligations.

Even more importantly, the overruling of *Kreiner* could potentially interrupt the delicate compromise struck by the Act and thus jeopardize the viability of Michigan's no-fault system. Amicus Curiae Attorney General Michael A. Cox respectfully requests the opportunity to defend these interests on behalf of the State and the People of Michigan.

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[10] MCL 500.3101(1).
[11] MCL 500.3101(4).

ARGUMENT

I. Kreiner sets forth a much-needed framework that supports the statutory language and effectuates the Legislature's intent in amending § 3135 of the No-Fault Act.

A. Standard of Review

This Court reviews questions of statutory interpretation de novo.[12]

B. Analysis

In 1973, Michigan enacted the No-Fault Act, 1972 PA 294, MCL 500.3101, *et seq*. It is well-established that the Act was a trade-off that limited tort liability to only the most serious cases, in exchange for providing personal injury protection benefits to motor vehicle accident victims.

In 1995, the Legislature responded to a judicial erosion of those limitations[13] by enacting 1995 PA 222, HB 4341, which amended the threshold provisions of § 3135 of the No-Fault Act. The amendments to § 3135: 1) returned the threshold question of whether the injured person has suffered serious impairment of body function or permanent serious disfigurement, to the courts instead of allowing juries to resolve where there are no material questions about the nature or extent of plaintiff's injuries;[14] 2) assessed damages based on comparative fault rather than a comparative negligence standard, with no damages assessed where a party is more than 50% at fault or where the party who was operating his or her own vehicle at the time of the injury was not insured;[15] 3) placed caps on the amount of noneconomic damages;[16] and 4) defined "serious

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[12] *Kreiner*, 471 Mich at 129 (citing *In re MCI*, 460 Mich 396, 413; 596 NW2d 164 (1999)).
[13] See *DiFranco*, 427 Mich at 32; see also House Legislative Analysis, HB 4341, December 18, 1995, p 1. (Attachment 1).
[14] MCL 500.3135(2)(a)(i) & (ii).
[15] MCL 500.3135(2)(b) & (c); MCL 500.3135(4)(a).
[16] MCL 500.3531(3) (a)-(d).

impairment of body function" to mean "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."[17]

Although these amendments to § 3135 helped set the standard, appellate decisions demonstrated that further guidance was needed. In 2004, this Court in *Kreiner v Fischer* set forth this much-needed guidance, specifically with regard to the Legislature's definition of "serious impairment of body function" and the definition's use of the phrase "general ability to lead their normal lives." The issue in *Kreiner* was whether any impairment of an important body function—so long as it in someway influences, touches, or otherwise affects the plaintiff's lifestyle, regardless of degree—is sufficient to satisfy the tort threshold contained in the definition.[18]

The answer was a resounding "no," but in so answering *Kreiner* set forth a framework that creates uniformity and predictability in the application of the statute, effectuates the intent of the Legislature in amending the statute, and supports the Act's overall goal of reducing litigation.[19] Therefore, *Kreiner* is good law and should not be overruled.

1. *Kreiner* is consistent with the statutory language and clarifies rather than expands it.

A court's role is not to consider the wisdom or the policy of the Legislature in enacting or amending a particular statute.[20] Instead, it is to determine the intent of the Legislature in amending the statute.[21] When that intent is ascertained, it must control.[22] Where the plain and

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[17] MCL 500.3135(7).
[18] *Kreiner*, 471 Mich at 121.
[19] *Cassidy v McGovern*, 415 Mich at 483.
[20] *Detroit Edison Co v Dep't of Revenue*, 320 Mich 506, 514; 31 NW2d 809 (1948) (citing *People v Powell*, 280 Mich 699; 274 NW372 (1937)).
[21] *Kreiner*, 471 Mich at 129, 139 (majority and dissenting opinions agreeing on this point).
[22] *Detroit Edison*, 320 Mich at 514 (citing *Acme Messenger Service Co v Unemployment Compensation Comm'n*, 306 Mich 704).

ordinary meaning of statutory language is clear, judicial construction is normally neither necessary nor permitted.[23] If, however, reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate.[24] Statutory language should be construed reasonably, keeping in mind the purpose of the act.[25] Moreover, every word is presumed to have force or meaning and should not be rendered surplusage.[26] Where a statute does not define a term, its ordinary meaning applies.[27] When faced with two reasonable interpretations of a word in a statute, courts should give effect to the interpretation that more faithful advances the legislative purpose behind the statute.[28]

The statutory language to be construed here is MCL 500.3135(7), which was added to the No-Fault Act in 1995 and defines "serious impairment of body function":

> As used in this section, "serious impairment of body function" means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."[29]

Specifically at issue here is the meaning of "general ability to lead his or her normal life."

a. Courts routinely clarify and/or provide a framework for practical workability of Legislative language.

Plaintiff argues that *Kreiner* expands the Legislature's definition of "serious impairment of body function." This argument implies that statutes necessarily spell out every detail of their

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[23] *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005); *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004).
[24] *Adrian School Dist v Mich Public Sch Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d (1988).
[25] *Twentieth Century Fox Home Entertainment, Inc v Dep't of Treasury*, 270 Mich App 539, 544; 716 NW2d 598 (2006).
[26] *Melia v Employment Security Comm'n*, 346 Mich 544, 562; 78 NW2d 273 (1956).
[27] MCL 8.3a; *Grimes v MDOT*, 475 Mich 72, 96; 715 NW2d 275 (2006).
[28] *People v Adair*, 452 Mich 473, 479-480; 550 NW2d 505 (1996) (citing *People v Rehkopf*, 422 Mich 198, 207; 370 NW2d 296 (1985)).
[29] MCL 500.3135(7).

subject matter. But often they do not or cannot. Nor do they always define every word used. Thus, courts are routinely called upon to illuminate the parameters created by statutory language.

The question of what constitutes a "general ability to lead his or her normal life" is comparable to other such questions that appellate courts have answered. For example, the question of whether an off-road vehicle (ORV) is a motor vehicle for purposes of the No-Fault Act is not specifically spelled out in the no-fault act, but appellate courts have determined, based on the Act's definition of motor vehicle, that location, rather than an operator's intent, determines whether an ORV is a motor vehicle.[30] Similarly, this Court provided a framework for determining whether under the No-Fault Act, MCL 500.3106(1)(a), a parked car posed an "unreasonable risk" of injury. This Court considered the manner, location, and fashion in which a vehicle was parked.[31] Even though that framework was not included in the actual language of the statute, it clarified rather than expanded the statutory language.

Our appellate courts have on numerous occasions been called upon to interpret the language of the exceptions to governmental immunity. For example, the question of what constitutes a highway or a sidewalk for purposes of governmental immunity has been clarified by case law.[32] Although the statute defined "highway," it did not define words contained in the definition such as "public highway," "road" or "street,"[33] or additional terms such as "shoulder" or "vehicular travel." Instead, the statute left courts to give these words their ordinary

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[30] *Morris v Allstate*, 230 Mich App 361, 370-371; 584 NW2d 340 (1998) (holding that an ORV was a motor vehicle because it was being operated on a public highway, and no-fault benefits were available to occupant).
[31] *Stewart v State*, 471 Mich 692, 698-699; 692 NW2d 376 (2004).
[32] See, e.g., *Grimes*, 475 Mich at 77 (meaning of "highway"); *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363; 579 NW2d 374 (1998) (meaning of "sidewalk")
[33] *Grimes*, 475 Mich at 77.

meaning.[34] Thus, this Court has used dictionary definitions to clarify what constitutes a "bodily injury,"[35] and has considered the dictionary definitions and common usage of the words "the" and "a" in determining what constitutes "the proximate cause" for purposes of applying the gross negligence exception to a government employee's statutory immunity.[36]

As our appellate courts have done countless times, this Court in *Kreiner* relied on the ordinary meaning of the words the Legislature chose to define "serious impairment of body function," and used them to provide a framework for applying the statutory language that is consistent with the legislative intent in amending the statute.

b. *Kreiner's* framework is objective enough to reflect the legislative intent, yet flexible enough to allow for meaningful case-by-case analysis.

As *DiFranco* pointed out, when the Legislature enacted the No-Fault Act in 1972 it rejected versions of the Act that would have limited recovery to cases involving a medical expense minimum or that would have required the serious impairment to be permanent or meet other specifications.[37] Clearly, the Legislature desired an analysis of the totality of the injured's life circumstances.

The 1995 amendments to § 3135 similarly reflect the Legislature's desire that the totality of the circumstances be analyzed—but in such a way that ensured a sufficiently strict threshold. Thus, when it amended, it once again did not choose language that set specific monetary thresholds, types of injury thresholds, or specific durational requirements—all of which would have served as an automatic bar to recovery of non-economic damages without regard for a

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[34] *Grimes*, 475 Mich at 88; *Nawrocki v Macomb Co Rd Comm'n*, 463 Mich 143; 615 NW2d 702 (2000).
[35] *Wesche v Kik*, 480 Mich 75, 84; 746 NW2d 847 (2008).
[36] *Robison v City of Detroit*, 462 Mich 439, 461-462; 613 NW2d 307 (2000); MCL 691.1407(2)(c).
[37] *DiFranco*, 427 Mich at 40-45.

plaintiff's life circumstances. Instead, it essentially adopted the *Cassidy* definition of serious impairment of body function, but clearly responded to *DiFranco's* criticism by adding "*his or her* normal life," thus assuring an individual analysis based on the totality of the circumstances of the specific case. That definition blended the Legislature's concern for the economic vitality of the no-fault system and the need to reduce litigation with its intent that the totality of the circumstances be analyzed.

Kreiner's guidance similarly blends the high threshold the Legislature intended with an objective framework that still allows for individual analysis of the injured's life circumstances. Plaintiff characterizes *Kreiner* as a "test" made up of judge-made obstacles not found in the statutory language. (Pl's Brief at 24.) Significantly, while Plaintiff criticizes *Kreiner,*[38] he offers no alternative to its guidance with respect to the meaning of "general ability to lead his or her normal life, other than to suggest that this Court "reaffirm the factors articulated in *DiFranco*[39] or to "identify other criteria faithful to the statutory language." (Pl's Brief, p 35, n 10).

Neither of these options is viable. As to a return to *DiFranco,* when the Legislature amended the No-Fault Act in 1995, it rejected the standard set forth in *DiFranco* and essentially returned to the *Cassidy* standard. Therefore, whatever the members of this Court believe to be the merits of, or problems with, those amendments, they cannot ignore the legislative intent and return to the *DiFranco* standard. As for Plaintiff's suggestion that this Court identify other criteria, under Plaintiff's analysis any "other criteria" that do more than simply repeat verbatim

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[38] This Court in *DiFranco* criticized *Cassidy's* "general ability to live a normal life" definition for being "as difficult to apply as the threshold it was designed to clarify." *DiFranco*, 427 Mich at 50. Yet, this criticism did not deter the Legislature when---with full knowledge of *DiFranco* (as evidenced by the Legislative history, House Legislative Analysis, HB 4341, December 18, 1995) (Attachment 1) it nearly word-for-word adopted *Cassidy's* definition.

[39] *DiFranco*, 427 Mich at 69-70.

the statutory language, would be an impermissible expansion. It would be nothing more than substituting a set of subjective judicial criteria for objective factors that address the Legislature's clear intent. Moreover, the practical effect of a subjective test with no guiding parameters would leave every trial judge attempting to individually determine what "general ability to lead a normal life" means, at the expense of a uniformity of decisions and adherence to the significant threshold the Legislature intended. It would also result in numerous unwarranted cases being sent to a jury, contrary to the intent of the 1995 amendments.

In contrast, *Kreiner's* guidance aids in the application of the Legislature's definition—not by creating a rigid test with specific factors that must be met, but rather, by offering a non-exhaustive list of factors to consider and by providing a framework to courts in analyzing "*general* ability," "*lead*," and "*his or her normal life*." Under *Kreiner*, courts engage in a "multifaceted inquiry" that compares Plaintiff's life before and after the accident, and the significance of "any affected aspects on the course of the plaintiff's overall life."[40] This inquiry involves an "objective analysis regarding whether any difference between the plaintiff's pre-and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life."[41] *Kreiner's* non-exhaustive list of objective factors aids courts in applying the Legislature's definition of "serious impairment of body function."

The beauty of the *Kreiner* framework is that it offers remarkable flexibility within an objective standard. Its guidelines are broad enough to encourage deep inquiry, yet narrow enough to effectuate the Legislative intent to reduce litigation and keep Michigan's no-fault system in balance. Not only is the list of objective factors nonexhaustive but also no individual

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[40] *Kreiner*, 471 Mich at 132-133.
[41] *Kreiner*, 471 Mich at 133.

factor need be dispositive. Rather, as *Kreiner* recognized, there must be a consideration of the "totality of the circumstances."[42]

c. *Kreiner* clarifies rather than expands the statutory language.

Kreiner does not impermissibly expand the 1995 amendments. It honors the legislative language by giving the Legislature's words their ordinary meaning and applying them in a framework that honors the legislative intent to have courts generally resolve the serious impairment threshold, and to ensure that the threshold for tort liability is high enough to make the no-fault trade-off viable.

(1) Consideration of the "course and trajectory" of the plaintiff's "entire normal life."

Kreiner's "course or trajectory" analysis is not, as Plaintiff suggests, a separate limitation. Rather, it is part of the framework for determining what constitutes the injured's "*normal* life," and whether the injury affects injured's "*general* ability" to *lead* that normal life. Plaintiff would have this court view the words "serious," "general," and "normal" as elastic or subjective (Pl's Br p 28), but such subjectivity is not within the legislative intent in amending § 3135. Where there are two reasonable meanings this court should choose the one that advances the Legislative intent.[43] Here, the Legislature intended that only the most serious injuries would go to a jury, and that the threshold be commensurate with the death and permanent impairment thresholds. Comparing pre and post accident lifestyles comports with that legislative intent.

Nor does consideration of "course and trajectory" and the plaintiff's "entire normal life" impose a permanency requirement, as Plaintiff argues (Pl's Brief, p 14).[44] *Kreiner* does not

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[42] *Kreiner,* 471 Mich at 134.
[43] *Adair*, 452 Mich at 479-480.
[44] *Kreiner,* 471 Mich at 135. Cf *Kreiner*, 471 Mich at 155 (stating that majority had created a more difficult test than that required by the Legislature by "requiring that the impairment affect every aspect of the course of a person's "entire" or normal life").

require that every aspect of the course of a person's life be affected, or that the injured must be affected for his or her entire life. It recognizes, however, that merely because some aspects of a plaintiff's entire normal life may be interrupted by the impairment does not mean that the "general ability" to lead his or her normal life has been affected.[45] *Kreiner* expressly states that the statute does not require that the impairment affect every aspect of the course of a person's entire or normal life.[46] Indeed, *Kreiner* specifically holds that compensable injury need not be permanent.[47] But it rightly recognizes, as did *Cassidy*,[48] that permanency is relevant and that the duration of the impairment is a significant factor that must be weighed.[49] Yet, the ultimate impact of duration on the determination of whether the injuries meet the threshold requirement will still depend on the facts of each case and the interplay of considerations that are specific to each plaintiff.

(2) Consideration of temporal factors

Plaintiff argues that "[i]f the general ability to lead his or her normal life is affected, the plaintiff is not barred from pursuing the ordinary tort remedy—regardless of how long the affect continues." But this argument puts the cart before the horse. Consideration of temporal matters allows a court to determine whether the injured's "general" ability to lead his or her normal life has been affected. For this reason, *Kreiner* held that impairment must be "of sufficient duration to affect the course of a plaintiff's life."[50] As *Kreiner* notes, temporal factors come into play differently for different people based on different circumstances. For example, under some circumstances allowing relief for a short impairment would not effectuate the Legislative intent.

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[45] *Kreiner*, 471 Mich at 131.
[46] *Kreiner*, 471 Mich at 135 n 16.
[47] *Kreiner*, 471 Mich at 135.
[48] *Cassidy*, 415 Mich at 505-506.
[49] *Kreiner*, 471 Mich at 133.
[50] *Kreiner*, 471 Mich at 135.

Consideration of the duration of the impairment is consistent with and implicit in the Legislature's use of the phrase "general ability. Thus, "the type and length of treatment required," "the duration of the impairment," "the extent of any residual impairment," and "the prognosis for eventual recovery" are relevant factors to consider,[51] and are consistent with the Legislature's use of the words "*general*" ability, "*lead*," and "*normal*" life.

It is significant that the Legislature chose to modify the word "ability" with the word "general." The CPAN amicus would have this Court read out the word "general" entirely, claiming that "general ability" means nothing more than ability. (Amicus of CPAN, pp 6-7). This erroneous analysis reads out the limitation imposed by the word "general," impermissibly rendering as surplusage the word "general." Therefore, CPAN's proffered analysis does not comport with the legislative intent.

The Legislature also chose the words "his or her normal" to modify the word "life." "Life" is often defined in terms of time: "The interval between the birth or inception of an organism and its death"; "the interval or amount of time during which anything exists or functions."[52] This suggests that courts should look to typical patterns over the course of time from birth to death. Accordingly, the phrase "his or her normal life" suggests a concept of time in relation to a particular individual.

(3) Requirement that residual impairment be based on physician-imposed, rather than self-imposed restrictions.

Plaintiff argues that *Kreiner's* requiring of physician-imposed, rather than self-imposed, restrictions is a hurdle to recovery not found in the language of the statute. He further argues that if the alleged injury "affects the person's general ability to lead his or her normal life, - - *due*

[51] *Kreiner*, 471 Mich at 133.
[52] The American Heritage Dictionary, 1976 ed, p 754.

to pain or otherwise - -" the threshold standard should be met. (Pl's Brief, p 33, emphasis added). This is Plaintiff's desired standard, but it is not the Legislature's. Plaintiff chooses to add the words "due to pain or otherwise." But those added words are contrary to the legislative language that makes economic recovery dependant in part on an "objectively manifested impairment" of an important body function.[53] The Legislature plainly rejected the idea that "subjective pain" could satisfy the serious impairment threshold. Section § 3135 must also be read as a whole, and when so read, Plaintiff's plea for a "subjective pain standard" is not supported by § 3135(2)(a)(ii). Section 3135 spells out an exception for closed-head injuries where a licensed allopathic or osteopathic physician testifies that there may be a serious neurological injury. In other words, that exception validates a plaintiff's subjective reports in this narrow set of circumstances. If subjective reports of pain and limitations satisfied the threshold, the closed-head injury exception would be unnecessary.

It is the Attorney General's position that the language of the amendments is plain and unambiguous. To the extent, however, this Court finds it ambiguous and thus considers the legislative history of the original Act—which is well-documented in this Court's case law[54] — and its 1995 amendments, that history supports *Kreiner's* analysis.

2. The Legislative history of the 1995 amendments support the *Kreiner* framework.

a. The Legislature was concerned with the economic reality of increased litigation and its impact on the viability of the no-fault system.

First, it is clear that the Legislature considered the balance between compensation for economic losses and the ability to sue to recover for non-economic damages:

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[53] MCL 500.3135(7).

[54] *Shavers*, 402 Mich at 578-579; *Cassidy*, 415 Mich at 499.

> Michigan's no-fault law needs to be in balance. The system was designed so that drivers would be compensated from their own policies for economic losses stemming from damage done to persons and properly due to accident, regardless of fault, in exchange for a strict limitation on lawsuits.[55]

Second, it is clear that the Legislature considered the fiscal implications of its 1995 amendments:

> To the extent that these provisions would reduce the number of lawsuits and the mount paid out in pain and suffering awards, they will reduce the costs of the insurance system and help reduce or restrain insurance premium costs in the competitive auto insurance marketplace. The system now is too expensive; this is one way, and a fair way, to make insurance more affordable for more people. Proponents of this bill say that there was a more than 100 percent increase in insurance lawsuits from 1986 to 1994, the years of the relaxed standards for lawsuits, whereas lawsuits declined by over 40 percent from 1982 to 1986, the years governed by the standards of the prior supreme court decision (to which this bill would return). The combination of high no-fault benefits and easy access to tort litigation, with high jury awards and defensive out-of-court settlements, threatens the system[.][56]

Additionally, Rep. Harold Voorhees, the sponsor of HB 4341, stated the bill would plug "'a very costly leak in the dike,' referring to the rise in lawsuits since a Supreme Court ruling enlarged the ability of injured persons to recover for serious impairment of bodily functions."[57]

Finally, the legislative history supports amicus curiae's concern that overruling *Kreiner* is likely to cause a rise in auto insurance premiums. "[P]remium dollars must be spent to defend

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[55] House Legislative Analysis, HB 4341 (December 18, 1995), p 2 (emphasis added) (Attachment 1). Although not considered official statements of legislative intent, bill analyses may have probative value. *Seaton v Wayne County Prosecutor*, 233 Mich App 313-321 n 3; 590 NW2d 598 (1998). This Court has often utilized legislative analysis and other legislative materials in determining legislative intent. See, e.g., *People v Quinn*, 440 Mich 178, 192-193; 487 NW2d 1994 (1992); *People v Grant*, 455 Mich 221, 219 ; 565 NW2d 389 (1997).

[56] House Legislative Analysis, HB 4341, (December 18, 1995), pp 2-3 (emphasis added) (Attachment 1).

[57] "Panel OKs auto insurance bill," TC Eagle, 5-18-95, contained in the Senate Legislative History. (Attachment 2)

the frivolous case in court. In some cases, it costs less to simply pay the frivolous claim than to pay defense attorneys, expert witnesses, medical experts, and insurance adjusters to fight it."[58]

b. The Legislature intended that the threshold for serious impairment of body function be commensurate with the threshold levels for death and permanent, serious disfigurement.

One of the issues addressed in both *Cassidy* and *DiFranco* was whether the levels of severity for recovery of non-economic damages in these three thresholds should be similar. This Court in *Cassidy v McGovern*, pointed out that in determining the seriousness of the injury required for a "serious impairment of body function," this threshold should be considered in conjunction with the other threshold requirements for a tort action for noneconomic loss, namely, death and permanent serious disfigurement.[59] As the Court reasoned, the Legislature did not intend to erect two significant obstacles to a tort action for noneconomic loss and one quite insignificant one.[60] *DiFranco* rejected this analysis, holding that the three threshold injuries listed in § 3135 are not equivalent in severity, and that the "serious impairment of body function" threshold was significant but not extraordinarily high.[61]

When the Legislature chose to amend § 3135, it was clearly aware of *Cassidy's* view on this point:

> The Cassidy court's ruling said that the legislature had not intended to raise two significant obstacles to lawsuits (death and permanent serious disfigurement) and

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[58] Memo to House Republican Caucus Members from Bill Peattie and Tom Halick, April 26, 1995, p 5. (Attachment 3); see also Senate Fiscal Agency Bill Analysis, May 10, 1995 (Attachment 4).
[59] *Cassidy,* 415 Mich at 504 (citing MCL 500.3135).
[60] *Cassidy*, 415 Mich at 504.
[61] *DiFranco,* 427 Mich at 60.

one quite insignificant one, and so a restrictive definition of "serious impairment of body function" was appropriate.[62]

The Legislature clearly rejected *DiFranco's* suggestion that the thresholds should not be viewed as a collaborative group.

It is also clear from the legislative history that the Legislature was aware that its return essentially to *Cassidy's* definition of serious impairment of bodily function meant a return to a more "stringent threshold."[63] Whether the Legislature's adoption of this "stringent threshold" was wise or problematic is not a question for this Court. As this Court has often noted, its function is to determine the intent of the Legislature. The legislative history demonstrates that the Legislature was aware that the definition embodied a high threshold commensurate with the thresholds for death and permanent impairment. *Kreiner's* framework supports this legislative intent.

3. Under the doctrine of stare decisis, there is no basis for overturning *Kreiner*.

Stare decisis means "to stand by things decided."[64] Stare decisis is preferred because "'[i]t promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the

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[62] House Legislative Analysis, HB 4341, Second Analysis, (December 18, 1995), p 1 (Attachment 1). See also Dep't of Commerce Bill Analysis of HB 4341, February 14, 1995, p 2 (Attachment 5) and Memo of Michigan State Representative Harold Van Voorhees, February 8, 1995 (Attachment 6).

[63] House Legislative Analysis, HB 4351, December 18, 1995, p 3 (Attachment 1). The "insurmountable obstacle" language derives from *DiFranco's* characterization of the effect of *Cassidy's* "general ability to live a normal life test," and was quoted in the testimony of the Michigan Trial Lawyers Association to the Senate Financial Services Committee, as support for MTLA's position that the *Cassidy* test should be rejected. See testimony of Michigan Trial Lawyers Association to the Senate Financial Services Committee, regarding HB 4341, May 9, 1995, pp 5, 7. (Attachment 7).

[64] Black's Law Dictionary (7th ed), p 1414.

judicial process."[65] In determining whether to overrule a precedent case, courts should look at whether the case's reasoning is fairly called into question, whether the decision defies "practical workability," whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision.[66]

First, nothing in the Legislative intent as evidenced by the plain language or the legislative history of the 1995 amendments, calls into question *Kreiner's* framework for evaluating whether an injury has affected a person's ability to live his or her normal life. *Kreiner's* guidance is consistent with the Legislature's use and positioning of the words "general" and "lead," in the phrase "general ability to lead a normal life." That guidance is also consistent with the clear legislative intent to reject *DiFranco* in favor of *Cassidy,* and return the level of the threshold of serious impairment to one commensurate with the Act's pain and permanent impairment thresholds.

Second, *Kreiner* serves to establish workability rather than a return to the *DiFranco* standard that, as the Legislature recognized, would increase litigation and jeopardize the Act's delicate balance. The threshold requirements for a traditional tort action for noneconomic loss play an important role in the functioning of the No-Fault Act."[67] As this Court recognized in *Kreiner,* "[t]he combination of the costs of continuing litigation and continuing overcompensation for minor injuries could easily threaten the economic viability, or at least desirability, of providing so many benefits without regard to fault."[68]

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[65] *Robinson*, 462 Mich at 463 (quoting *Holder v Hall*, 512 US 874, 944; 114 S Ct 2581; 129 L Ed 2d 687 (1994)).
[66] *Robinson*, 462 Mich at 465 (citing *Planned Parenthood v Casey*, 505 US 833, 853-856; 112 S Ct 2791; 120 L Ed 674 (1992)).
[67] *Kreiner,* 415 Mich at 501.
[68] *Kreiner,* 415 Mich at 500.

Third, *Kreiner* works no greater hardship on the person who suffers injury than the compromises embodied in the Act's trade-off between payment of medical benefits and limited opportunity to sue in tort. To the contrary, the inability to rely on *Kreiner* would work a hardship on the Michigan citizens who must purchase and pay the increased costs of automobile insurance. Additionally, it would work a hardship on the State of Michigan as a self-insured entity. It would also work a hardship on all Michigan citizens who substitute their common-law remedy in tort in reliance on the economic viability of the no-fault system in continuing to deliver prompt payment of medical expenses to those who have been injured in automobile accidents—regardless of fault.

Finally, there is no change in the law or other circumstances that warrants overruling *Kreiner*. *Kreiner* is good law and supports both the goals of the original Act and the intent of the Legislature in amending Michigan's No Fault Act. This Court should adhere to this decision.

RELIEF SOUGHT

Kreiner's framework is instrumental in understanding the meaning of the Legislature's definition of "serious impairment of body function" and in applying an objective standard when analyzing the totality of circumstances involved in resolving the issue of whether the victim of a motor vehicle accident meets the serious impairment threshold for purposes of recovering non-economic damages under Michigan's No-Fault Act. *Kreiner's* guidance is consistent with the statutory language, and supports the legislative intent to reduce litigation by creating a high threshold that weeds out non-serious injuries and ensures that the serious impairment question is generally evaluated by a judge as a matter of law.

Amicus Curiae Attorney General Michael A. Cox respectfully urges this Honorable Court to affirm the analysis and guidelines set forth in *Kreiner v Fischer*.

Respectfully submitted,

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Dated: January 7, 2010

Attachment 1

House Legislative Analysis, HB 4341, December 18, 1995

(Found in both House and Senate archived material)

House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

NO-FAULT TORT THRESHOLD

House Bill 4341 as enrolled
Public Act 222 of 1995
Second Analysis (12-18-95)

Sponsor: Rep. Harold S. Voorhees
House Committee: Insurance
Senate Committee: Financial Services

THE APPARENT PROBLEM:

Under Michigan's no-fault auto insurance system, motorists look to their own insurance policies for benefits (such as medical treatment and lost wages) in case of accidents and injuries and can only sue another motorist in extraordinary circumstances. The promise of no-fault insurance is that by giving up the traditional right to sue, claims will be settled more predictably and without as much dispute and delay, compensation will more closely match losses, and more of the customers' premium dollars will be spent on the payment of claims and less on administration costs and transaction costs, such as legal fees. It is still possible to sue a negligent driver under most no-fault systems when injuries go beyond a certain "threshold", expressed either in a dollar amount or in a "verbal" description.

Michigan's statute contains a verbal threshold for non-economic damages. (Additionally, people can sue for intentionally caused harm; for allowable expenses, work loss, and survivor's loss beyond those covered by no-fault insurance; and for damages to motor vehicles not covered by insurance, up to $400.) Lawsuits are only permitted for non-economic (e.g., "pain and suffering") losses in case of "death, serious impairment of body function, or permanent serious disfigurement." The phrase "serious impairment of body function" has been interpreted twice in decisions of the Michigan Supreme Court, the second decision more or less repudiating the first. In 1982, in what is called the Cassidy decision, the court said basically that whether the "serious impairment of body function" threshold had been met in a given case was a matter of statutory construction for a trial court (i.e., a judge not a jury) to decide. It also said that the phrase referred to "important" body functions. The court also held that an injury should be "objectively manifested" (e.g., by x-ray). The Cassidy court's ruling said the legislature had not intended to raise two significant obstacles to lawsuits (death and permanent serious disfigurement) and one quite insignificant one, and so a restrictive definition of "serious impairment of body function" was appropriate. Nor, the court said, had the legislature intended that the threshold vary jury by jury or community by community.

However, in 1986, in the DiFranco ruling, the court rejected its earlier decision (the membership was not the same). It put the question of whether a person had suffered a serious impairment of body function in the hands of the "trier of fact" (i.e., a jury or judge sitting without a jury) whenever reasonable minds could differ as to the answer. The court said the threshold is "a significant, but not extraordinarily high, obstacle" to recovering damages and that "the impairment need not be of the entire body function or of an important body function", and "need not be permanent." This decision has governed the application of the tort threshold since then. Insurance companies and some others have portrayed this decision as an unwarranted liberalization of the no-fault law that has led to increased litigation and increased costs to the insurance system, thus contributing to higher premiums for insurance consumers. Amendments to the no-fault statute that would return to a tort threshold resembling that provided by the Cassidy ruling were key elements of the two comprehensive reform proposals (which dealt with a great many other issues, as well) defeated at the polls in 1992 and 1994 and have been introduced again, this time standing alone.

THE CONTENT OF THE BILL:

Michigan's no-fault automobile insurance system only permits lawsuits for non-economic losses ("pain and suffering") when a certain threshold of injury has been met. The Insurance Code says that a person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person "has suffered death, serious impairment of body function, or permanent serious disfigurement." The expression "serious impairment of body function" is not currently further defined in statute, but its meaning is governed by a state supreme court ruling. House Bill 4341 would put a more restrictive definition in statute by specifying that

"serious impairment of body function" means "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

The bill also would specify that the following provisions would apply to a lawsuit for non-economic damages.

-- The issues of whether an injured person had suffered serious impairment of body function or permanent serious disfigurement would be questions of law for the court (i.e., issues for a judge to decide rather than, as now, a jury) if the court found either of the following.

* There was no factual dispute concerning the nature and extent of the person's injuries.

* There was a factual dispute concerning the nature and extent of the person's injuries, but the dispute was not material to the determination as to whether the person had suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury would be created if a licensed allopathic or osteopathic physician who regularly diagnosed or treated closed-head injuries testified under oath that there a serious neurological injury could exist.

-- Damages could not be assessed in favor of a party who was more than 50 percent at fault.

-- Damages could not be assessed in favor of a party who was operating his or her own vehicle at the time of the injury and did not carry required insurance coverage on the vehicle.

The bill would apply to causes of action for damages filed on or after 120 days after the effective date of the bill.

The bill also would expand the current "mini-tort" exception to the limitation on lawsuits. Under the no-fault act, a person is liable for damages to a motor vehicle up to $400, to the extent that the damages were not covered by insurance. (This means a person can recover the amount of a deductible, up to $400, from a person who damages his or her motor vehicle.) The bill would raise the amount of damages that can be recovered to $500.

MCL 500.3135

FISCAL IMPLICATIONS:

The Senate Fiscal Agency has said that the impact on state and local units of government is indeterminate. The agency notes that the cost to the state of losses under the no-fault auto insurance law (in amounts paid and reserves) was $3.2 million in fiscal year 1992-93 and $3.1 million in fiscal year 1993-94, and that "to the extent that this bill would limit exposure, there are potential savings." (SFA floor analysis dated 5-24-95)

ARGUMENTS:

For:

Michigan's no-fault law needs to be in balance. The system was designed so that drivers would be compensated from their own policies for economic losses stemming from damage done to person and property due to accidents, regardless of fault, in exchange for a strict limitation on lawsuits. The limitation on lawsuits for non-economic ("pain and suffering") damages was weakened by a 1986 state supreme court decision, and the no-fault statute needs to be restored to its condition prior to that decision. That means making the determination of whether the threshold for a lawsuit has been met a question of law for a judge to decide and not for a jury. And it means that the term "serious impairment of body function" would once again refer to "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life" (emphasis added). Together, these provisions will work toward ensuring that the cases that go forward are deserving of a hearing before a jury. The undeserving and frivolous cases will be weeded out.

Other provisions will help to accomplish this as well. The bill would prevent those who are more than 50 percent at fault in an accident from being able to collect damages from other parties. It is an absurdity that a driver who shoulders the majority of the blame for an accident is able to successfully sue others for his or her "pain and suffering." It should be kept in mind that the state moved to a comparative negligence system (where damages are based on share of fault) from a contributory negligence system in 1979, after no-fault was enacted. Under the old system, proponents say, at-fault parties could not collect. It is also unjust that an uninsured driver -- who does not contribute to the no-fault insurance system -- can sue for non-economic damages to be paid out by the insurance company of a person who is contributing to the system. The bill would no longer permit that.

To the extent that these provisions would reduce the number of lawsuits and the amount paid out in pain and suffering awards, they will reduce the costs of the insurance system and help reduce or restrain insurance premium costs in the competitive auto insurance

marketplace. The system now is too expensive; this is one way, and a fair way, to make insurance more affordable for more people. Proponents of this bill say that there was more than a 100 percent increase in insurance lawsuits from 1986 to 1994, the years of the relaxed standards for lawsuits, whereas lawsuits declined by over 40 percent from 1982 to 1986, the years governed by the standards of the prior supreme court decision (to which this bill would return). The combination of high no-fault benefits and easy access to tort litigation, with high jury awards and defensive out-of-court settlements, threatens the system; it will become unaffordable to ever more insurance customers.

Several points can be made about the features of this bill, based in part on the reasoning of the 1982 supreme court decision on how the term "serious impairment of body function" should be applied.

-- Putting the determination of whether the threshold has been met into the hands of the judge (as a matter of law) makes sense for several reasons. It will reduce the number of jury trials, which otherwise would be needed to make the determination, and reducing litigation is a goal of no-fault. It will produce more uniformity in decisions by allowing judges to construct the statute rather than juries, which are more likely to vary in attitude based on geography or even one jury to the next. Further, the phrase in question is not commonly used, so juries are not likely to have a clear sense of its meaning. Putting these matters before a judge also reduces defense costs and reduces the stress of being sued for defendants.

-- The expression "serious impairment of body function" must be understood in connection with the other tort thresholds, death and permanent serious disfigurement. These are high standards. It is not sensible to impose two tough barriers to lawsuits and one porous one. The expression cannot be allowed to refer to just any body function nor can it mean all body function or entire body functioning. The middle ground is to require that an important body function be impaired. Further, it should apply to the effect of the impairment on an injured person's general ability to live a normal life and not to injuries that do not have such an impact.

-- There ought to be some objective manifestation of the injuries being claimed in order to determine the basis for the alleged impairment before a plaintiff can present the story of his or her "pain and suffering" to a jury. It should be noted that the bill would allow head injury cases to go to a jury if a physician with experience with such injuries testifies under oath that a serious neurological injury may be present.

Against:

Virtually the same provisions contained in this bill were part of the auto insurance proposals resoundingly defeated at referendum both in 1992 and 1994. The advertising campaign for the 1994 proposal prominently featured the restriction on lawsuits, as well as focusing on the promised 16 percent rate cut. Voters rejected this. Why is it back before the legislature again? Further, the language contained in the bill echoes an earlier interpretation of the statute that was firmly repudiated in 1986 by the Michigan Supreme Court. The court declared that both the requirement that injuries be "objectively manifested" (as that term had been subsequently refined in an appeals court case) and that the injury must interfere with a person's "general ability to live a normal life" constituted "insurmountable" obstacles to recovering non-economic damages. Does it make sense to return to this stringent threshold rejected by both the supreme court and the state's voters? Does it make sense to erect this high barrier to lawsuits, depriving seriously injured auto accident victims of their opportunity to present their case to a jury of peers, particularly since there is no guarantee that any savings to insurance companies will be returned to customers in the form of rate reductions? (What, in fact, are the savings likely to be, given that the cost of these lawsuits is a minor portion of the insurance premium?)

Contrary to the arguments of the insurance companies, the current threshold is a relatively stiff one. Reportedly, Michigan is next to last in bodily injury claims in proportion to property damage. It is one of the most difficult states in which to bring an auto-related lawsuit. Indeed, if there is a lawsuit problem, it is because of the number of suits filed against insurance companies to make them provide the first-party benefits to which policyholders are entitled under their policies. People sometimes have to fight to get these benefits. It should be noted that the language of the tort threshold provisions in the no-fault statute has not changed since the law took effect in 1973. The bill does not, as is sometimes said, restore the original intent of the law. If anything, the 1986 DiFranco decision that this bill would overturn did that. The 1982 Cassidy decision could be called the aberration (contradicting as it did an advisory opinion issued by an earlier supreme court before the no-fault statute took effect).

The following points can be made regarding the elements of the bill.

-- Taking the threshold determination away from juries is unwarranted. It denies plaintiffs the right to present their case to a jury of peers. In the past, a

representative of trial judges has opposed this as an ineffective use of judicial resources, as likely to give rise to more appeals of threshold determinations, and as a potential source of litigation over the constitutionality of this portion of the no-fault law. In the DiFranco case, the state supreme court said, regarding the experience under the Cassidy standards, that the courts "have proven to be no more consistent than juries" in determining the threshold question. The court said that "properly instructed juries are capable of weighing evidence and using their collective experiences to determine whether a particular plaintiff has suffered an impairment of body function and whether the impairment was serious."

-- The requirement that an injury be "objectively manifested" could unfairly penalize accident victims with serious injuries that are not subject to medical measurement.

-- Preventing a person more than 50 percent at fault from collecting damages sounds sensible. But it ignores the fact that the determination of fault is not an exact science. Accidents are often not investigated properly or thoroughly. Mistakes are made and often not corrected. If at-fault drivers are to be penalized, the percentage of fault should be much higher (perhaps 80 percent) to eliminate the gray areas. By some estimates, only one-quarter of cases brought now feature drivers 100 percent at fault. The bill's limitation means a person catastrophically injured in an auto accident by a (more or less) equally at-fault driver would be unable to collect non-economic damages. An alternative approach might be to prevent someone who was both more than 50 percent at fault and convicted of drunk driving from being able to sue.

-- Similarly, an uninsured person could not collect. Is it fair that a 20-year-old whose life is ruined by a drunk driver, for example, should be completely foreclosed from collecting damages because he or she did not carry mandatory auto insurance? Many uninsured drivers do not carry insurance because they cannot afford it, not because they want to flout the law.

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

Attachment 2

"Panel OKs auto insurance bill," TC Eagle, 5-18-95, contained in the Senate Legislative History

Panel OKs auto insurance bill

■ Proposed law would bar damages for pain, suffering if the person was largely to blame

TC Eagle 5-18-95

LANSING (AP) — A Republican bill designed to curb lawsuits under Michigan's no-fault auto insurance system cleared a Senate panel Wednesday on a party-line vote.

Republicans argued the House-passed bill would cut legal costs and was supported by the people as a fair change. Minority Democrats charged the GOP was trying to enact, piece by piece, ballot proposals already rejected by voters.

"We need to put a finger in the dike," said Rep. Harold Voorhees, R-Grandville and sponsor of the measure. "This is what people want us to do. People want us to address it (auto insurance coverage and rates) issue by issue."

Sen. James Berryman, D-Adrian, protested that recent auto insurance ballot proposals were being advanced in the Legislature despite overwhelming rejection by voters.

"Now it's being piecemealed through the Legislature," he said. "Other parts will come."

The issue of revamping Michigan's auto insurance law has been a bitterly contested matter in recent years. Twice, voters have rejected ballot proposals that pitted the insurance industry against trial lawyers.

The bill, which does not deal with insurance rates, would bar damages for pain and suffering if the person was largely to blame for an accident.

It also requires a judge, not a jury, to decide if a victim suffered a serious impairment of a bodily function and requires victims to suffer such an injury to collect certain damages, among other things.

The bill was approved on a 3-2 vote of the Senate Financial Services Committee, and now goes to the full Senate. It passed the House along with changes in the general lawsuit system, but the broader issue went before another committee.

"Our constituents have indicated these reforms are a matter of justice," Voorhees said. "It will reduce court activity."

"My constituents are not going to see this as a fair trade," Berryman responded, noting that the bill calls for restrictions on lawsuits but no cut in insurance rates.

"I do think there is room for a compromise. If we don't, it's going to be a standoff on party-line votes."

"What this bill does is inject a lot of common sense," said Sen. Mike Rogers, R-Howell.

Highlights

Major changes to the state's no-fault auto insurance system as contained in a bill approved Wednesday by a Senate committee:

- Bars victims from collecting pain and suffering damages if they were more than 50 percent at fault for the accident.
- Prohibits victims from collecting damages if they were driving an uninsured vehicle.
- Requires victims to suffer serious impairment of a bodily function to collect damages for pain and suffering.
- Allows a judge rather than a jury to determine if an injury meets the lawsuit threshold.
- Creates a comparative damage system so victims cannot collect damages for their percentage of fault. For example, a person found 20 percent at fault could collect only 80 percent of the damages awarded.

Attachment 3

Memo to House Republican Caucus Members from Bill Peattie and Tom Halick, April 26, 1995

MICHIGAN
HOUSE OF REPRESENTATIVES
P.O. Box 30014
LANSING, MICHIGAN 48909-7514

Republican
Programs & Research Section
517/373-1338

TO: House Republican Caucus Members

FROM: Bill Peattie and Tom Halick

RE: HB 4341 (H-1) Voorhees)
Q & A - No-Fault Tort Reform

DATE: April 26, 1995 DOCUMENT:95q&anf.ins

Below are several questions you may be confronted with and sample answers to the questions.

Didn't the voters already reject this?

1. Why are the Republicans taking-up the issue of no-fault reform again when it has been rejected twice by the voters?

A. Prior bills have tried to fix all of the problems with the no-fault law in one bill. Unfortunately, the citizens of the state had to accept or reject the whole bill, even if they only disliked a minor part of the bill. This bill focuses on only one problem area.

A2. There was strong public support for the provisions in "Proposal C" aimed at stopping lawsuit abuse. This bill will achieve those ends.

2. Why are the Republicans again catering to the insurance industry?

A. The insurance industry is in favor of this reform, but they are not the major proponents. This bill was introduced through the sponsor's own initiative. **In fact, the Michigan Consumer Federation (which opposed Proposal C as a whole) has gone on record as supporting the tort reform measures in Proposal C.** These reforms are moderate and fair.

3. Why are juries excluded from the process of determining which injuries meet the "threshold" for pain and suffering damages?

A. Juries are not excluded from the process. The bill gives the judge the power to make the initial decision of whether the plaintiff has met the threshold requirement. If the requirements have been met, the case is sent to the jury to decide whether the defendant was negligent and if so, the amount of damages. This is a needed safeguard to prevent frivolous cases.

(Don't let anyone confuse the issue by implying that non-threshold medical expenses will go uncompensated. See # 4 below.)

4. Does the bill limit recovery of medical expenses or wage loss benefits?

A. No, section 3107 is unchanged and still provides that a person can collect unlimited medical benefits. The bill places safeguards in the collection of non-economic (pain and suffering) damages.

5. Don't you trust juries to determine the severity of injuries?

A. Yes I do. Juries will still decide questions of liability and damages in meritorious cases. However, it's not fair to ask a jury to interpret the technical, statutory criteria, and to know the principles and precedents of case law, as is necessary to determine when an injury meets the legal threshold. Judges are better equipped to make these legal determinations. Under this bill, there will be more uniformity as to what constitutes a threshold injury because judges hear hundreds of these cases, while a jury hears a case once in a lifetime, and for them it is a matter of first impression, and their determinations will vary widely from cases to case. Justice demands equality and uniformity, which can best be achieved by allowing judges to decide legal questions.

6. Will judges impose overly strict standards and deny injured persons benefits?

A. No. First, injured persons who are covered by no-fault policies are entitled to unlimited PIP benefits, which are the most generous in the nation, without the need to file suit. This reform only affects the ability to sue for non-economic damages. Second, the system proposed by this bill *was the law* from 1982 until December, 1986 -- there is no evidence that judges were too harsh. (Over 8,700 auto no-fault cases were filed each year from 1984 - 1986, during the reign of Cassidy. These cases would not have been filed if there was no prospect of recovery). Serious injuries will still go to a jury as they did under the "Cassidy standard".

7. Why are the Republicans trying to prohibit injured persons from collecting non-economic (pain and suffering) damages?

A. The reforms will not prohibit a person who suffers a genuine and severe injury from collecting non-economic damages. The bill will limit bogus and frivolous suits that we all pay for via higher premiums. The goal of the reforms is return the no-fault law back to its original intent. That intent was to limit the recovery of non-economic damages to only those people who suffered death, serious impairment of body function, or permanent serious disfigurement. The courts have misinterpreted the law and have opened the door to lawsuits for relatively minor and unsubstantiated injuries. The foundational element for a viable no-fault system is the strict limitation of residual liability suits in return for guaranteed medical and wage loss benefits, regardless of a person's fault. This bill will still allow non-economic damages for persons suffering genuinely severe injuries.

Miscellaneous Issues.

8. Does this (modified comparative fault) let drunk drivers off the hook?

A. By no means. A negligent drunk driver is subject to liability for serious injuries he/she causes.

9. But what if the "victim" of the drunk driver was also partly at fault?

A. If a jury determines that the "victim" was more negligent than the drunk driver in causing his/her own injuries, then the "victim" cannot recover residual damages against the other driver and is limited to PIP benefits. However, the fact that the other driver was drunk will play heavily in the juries determination of damages -- most likely the drunk driver will be found more than 50% at fault.

(Of course, the drunk driver is also subject to serious criminal penalties, so he/she is not "let off the hook".)

10. How does the bill affect passengers with threshold injuries?

Example 1. A parent is more than 50% at fault and his/her child (or any other passenger) suffers a threshold injury. Can the parent collect non-economic damages? Can the passenger collect non-economic damages?

A. The parent is prohibited from collecting non-economic damages. The passenger was not the one found to be at fault and therefore can collect non-economic damages. The passenger's estate can collect non-economic damages if the passenger has died.

Example 2. A parent is driving an uninsured car and his/her child (or any other passenger) suffers a threshold injury. Can the parent collect non-economic damages? Can the passenger collect non-economic damages?

A. The parent is prohibited from collecting non-economic damages. Since the passenger was not the one operating the uninsured vehicle at the time of the accident, passenger or their estate can collect non-economic damages.

11. Why should a person who is uninsured be able to sue an at-fault driver?

A. They shouldn't. A person who drives his or her own vehicle without insurance is violating the law, is not entitled to PIP benefits, and is defrauding other drivers who do buy insurance. A person who chooses to drive his own car without insurance should not be able to indirectly siphon money from a pool of insurance funds created by our premium dollars which he did not contribute to.

12. Aren't there already laws to prevent frivolous lawsuits?

A. Yes, under existing statutes and court rules, attorneys and parties can be sanctioned for filing frivolous lawsuits. However, these provisions are rarely applied, and leave far too much leeway for attorneys and judges to stretch the intent of the no-fault law beyond the breaking point. (The sanctions don't apply unless a case is totally devoid of arguable legal merit -- which is a nearly impossible standard to meet.) Attorneys have an ethical duty to use the substantive law to the greatest benefit to their clients. Rather than focus on attorney sanctions, the substantive legal rules must be tightened up to limit the "creative abuses" of lawyers and litigants. This bill does so, by giving judges more discretion to dismiss cases that lack merit. Also, when cases do go to trial, the plaintiff will be denied recovery if his or her fault is equal to that of the other driver. These reforms will make it more difficult for at-fault plaintiffs, and plaintiffs with minor injuries, to abuse the no-fault law.

13. What is a mini-tort suit?

A. This is a small claims suit that an insured can bring to recovery for uninsured damage to his or her vehicle. If you are in an accident, and you are not more than 50% at fault, you may sue the other driver to recover an amount up to $400.00, which will be increased to $500.00 under this bill. This amount is about equal to the amount of your deductible if you carry collision coverage.

14. Is no-fault tort reform really needed?

A. Yes, the original intent of the no-fault law to put strict limitations on tort litigation by implementing a system of swift compensation for losses and injuries without having to undergo expensive court actions to establish fault, but those limitations have eroded over time. Tort reform is not just a state issue, but a national issue.

15. Will insurance rates go down if this bill is enacted?

A. Consumers will not see instant rate reductions, but this is a positive step. Other reforms will have to be enacted to ensure rate reductions. There is no question that

frivolous lawsuits drive up insurance costs. This is because your premium dollars must be spent to defend the frivolous case in court. In some cases, it costs less to simply pay the frivolous claim than to pay defense attorneys, expert witnesses, medical experts, and insurance adjusters to fight it.

Attachment 4

Senate Fiscal Agency Bill Analysis, May 10, 1995

Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

SFA BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986
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House Bill 4341 (Substitute H-1)
Sponsor: Representative Harold S. Voorhees
House Committee: Insurance
Senate Committee: Financial Services

Date Completed: 5-10-95

SUMMARY OF HOUSE BILL 4341 (Substitute H-1) as passed by the House:

The bill would amend the no-fault automobile insurance provisions of the Insurance Code to do all of the following:

- **Provide that certain issues regarding personal injury in tort liability actions would be questions of law for the court.**
- **Require that damages in tort liability cases be assessed on the basis of comparative fault.**
- **Prohibit damages from being assessed in favor of a party who was more than 50% at fault or who operated his or her vehicle without the required insurance coverage.**
- **Increase the maximum level of vehicle damages for which tort liability is available to the extent those damages are not covered by insurance.**
- **Define "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life".**

The Code's no-fault provisions specify that a person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. The bill specifies that, for a cause of action for damages allowed under that provision and filed on or after 120 days after the bill's effective date, the issues of whether an injured person had suffered serious impairment of a body function or permanent serious disfigurement would be questions of law for the court (rather than a jury) to decide, if the court found either of the following:

- There was no factual dispute concerning the nature and extent of the injuries.
- There was a factual dispute concerning the nature and extent of the injuries, but the dispute was not material to the determination of whether the person had suffered a serious impairment of a body function or permanent serious disfigurement. (For a closed-head injury, however, a deposition under oath by a licensed allopathic or osteopathic physician familiar with closed-head injuries that there could be a neurological injury would create a question of fact for the jury.)

Also, under the bill, damages would have to be assessed on the basis of comparative fault, except that damages could not be assessed in favor of a party who was more than 50% at fault, or in favor of a party who operated his or her own vehicle at the time an injury occurred and did not have in effect for that vehicle the insurance coverage required by the Code.

In addition, the Code provides that, with certain exceptions, tort liability arising from the ownership, maintenance, or use within Michigan of a motor vehicle that has the required insurance coverage is abolished. One of the exceptions is for damages of up to $400 to motor vehicles, to the extent that the damages are not covered by insurance. The bill would increase that amount to $500.

MCL 500.3135

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bill would have an indeterminate impact on the State and local units of government. The total cost to the State of automobile no fault losses (amount paid and reserves) was $3.2 million for FY 1992-93 and $3.1 million in FY 1993-94. To the extent that this bill would limit exposure, there are potential savings.

The bill would have no fiscal impact on the courts.

Fiscal Analyst: B. Bowerman
L. Nacionales-Tafoya

S9596\S4341SA

Attachment 5

Department of Commerce Bill Analysis of HB 4341, February 14, 1995

STATE OF MICHIGAN

John Engler, Governor

DEPARTMENT OF COMMERCE

Arthur E. Ellis, Director

Insurance Bureau
P.O. Box 30220
Lansing, Michigan 48909-7720

BILL ANALYSIS

HOUSE BILL: 4341

TOPIC: Auto Insurance

SPONSOR: Representative Harold Voorhees

HOUSE COMMITTEE: Insurance

POSITION: The Insurance Bureau supports the bill.

PROBLEM STATEMENT:

Under the verbal threshold of Michigan's no-fault auto insurance law, an injured party may only sue for noneconomic loss if she/he has suffered death, permanent serious disfigurement, or serious impairment of body function. The question of what constitutes a "serious impairment of body function" has been a question before Michigan courts several times since the law took effect in 1973. In 1982, the Michigan Supreme Court, in the case of Cassidy v McGovern, defined the terms with specific standards and ruled that, if no material factual dispute existed regarding the nature and extent of the injury, the threshold question is a matter of law to be decided by the court. In 1986, the Cassidy decision was reversed by the Michigan Supreme Court in the case of DiFranco v Pickard. In the DiFranco case, the Court rejected the findings in Cassidy and ruled that the threshold question was to be decided by a jury as a question of fact. Since the DiFranco case, the number of auto negligence cases filed has risen and the premiums for the liability portion of an auto insurance policy have increased.

DESCRIPTION OF BILL:

The bill would put into law the Cassidy standards for meeting the serious impairment of body function threshold. That is, in order to bring suit for noneconomic loss, the person would have to have suffered an objectively manifested impairment of an important body function that affects his or her general ability to lead a normal life. Whether an injury met the threshold would be a question of law for the court. In addition, the bill would prohibit a party who is 50% or more at fault, or a motorist who does not have the required insurance coverage at the time of the injury, from collecting damages for noneconomic loss.

SUMMARY OF ARGUMENTS:

Pro:

Michigan's no-fault law was designed to provide a high level of personal injury protection benefits in exchange for limitations on the ability to sue. Premium dollars which in the past had been used for legal costs and liability claims payments were to be returned to the policy holder in the form of medical benefits and payment for lost wages. In order to keep premiums at a reasonable level, however, a strict limitation on lawsuits is needed for if generous payments were to be made under both the personal protection coverage and the liability coverage, the system would quickly become unaffordable. The threshold as defined by the Cassidy case was in keeping with that needed balance in that it defined "serious impairment of body function" in terms which made it similar to the seriousness of the other two threshold tests -- death, and permanent serious disfigurement.

A party who is substantially at-fault will have his or her medical bills and lost wages paid by his or her own insurer. It seems inappropriate, however, to reward the negligent party by allowing them to collect noneconomic damages from a party who had the same or less responsibility for the accident. In addition, an individual who refuses to participate in the state's compensation system should not be allowed to benefit from that system.

Con

In the past, opponents have argued that in issuing the DiFranco decision, the Supreme Court specifically rejected the standards in the Cassidy case. They argue that the court did so because of the bad results under Cassidy and sought to return the no-fault system to the standards used prior to the Cassidy case.

SUPPORTERS:

The insurance industry has expressed support for such a change in the past.

OPPONENTS:

The Michigan Trial Lawyers Association has opposed such a change.

FISCAL INFORMATION:

None.

ECONOMIC IMPACT:

Restricting lawsuits under Michigan's no-fault auto insurance law would result in lower liability costs, thereby reducing premiums and lowering future cost increases.

Patrick M. McQueen
Acting Commissioner of Insurance

2-14-95
Date

Arthur E. Ellis, Director
Department of Commerce

2-15-95
Date

Attachment 6

Memo of Michigan State Representative Harold Van Voorhees, February 8, 1995

77TH HOUSE DISTRICT
STATE CAPITOL
LANSING, MICHIGAN 48913
(517) 373-2277
(517) 373-8731 (FAX)

P.O. BOX 9335
WYOMING, MICHIGAN 49509-0335

HAROLD J. VOORHEES

Michigan State Representative

COMMITTEES:
LOCAL GOVERNMENT, VICE CHAIR
INSURANCE
MILITARY AND VETERANS AFFAIRS
STATE AFFAIRS
TRANSPORTATION

House Bill 4341 will accomplish four goals:

(1) Reestablish the two part Cassidy standard of: (1) definition of "serious impairment of body function," and (2) make the determination of whether an injury is a serious impairment of body function a question of law (judge) rather than of fact (jury).

(2) Prohibit suits by parties 50% or more at fault.

(3) Prohibit uninsured drivers from recovering "pain and suffering" damages.

(4) Raise the mini-tort limit to $500 but again prohibit suits by parties 50% or more at fault.

Attachment 7

Testimony of Michigan Trial Lawyers Association to the Senate Financial Services Committee, regarding HB 4341, May 9, 1995

MICHIGAN TRIAL LAWYERS ASSOCIATION

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Phone (517) 482-7740 • FAX (517) 482-5332

David R. Getto
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Legislative Counsel

TESTIMONY OF

THE MICHIGAN TRIAL LAWYERS ASSOCIATION

TO THE

SENATE FINANCIAL SERVICES COMMITTEE

RE: HOUSE BILL 4341

Wednesday, May 9, 1995
Lansing, Michigan

THE CURRENT MICHIGAN NO-FAULT TORT THRESHOLD - BALANCE RESTORED

A. The third party tort case plays an important societal role in a no-fault system.

Michigan has never adopted or even come close to adopting a "pure no-fault system". In a pure no-fault system, the wrongdoer causing the accident is totally immunized from any liability for damages he or she inflicted on innocent victims. Under pure no-fault, the victim is left with only those "no-fault benefits" (medical expenses, limited wage loss benefits, etc.) that the victim can recover from his or her own no-fault insurance company. Thus, in a pure no-fault system, the drunk driver with repeat alcohol violations, the trucker who disobeys federal and state motor carrier regulations regarding consecutive hours driven, the reckless student who goes joy riding at high speed through a populated downtown area losing control of the vehicle and injuring innocent bystanders, are all given total and complete immunity from any liability.

So what is wrong with that? Obviously, it flies in the face of one of the most deeply rooted notions of anglo American law - legal accountability. Our system of law is premised upon the fundamental principle that all persons must be responsible for the consequences of their conduct. If, as a result of negligence, someone causes injury or damage to an innocent party, it is the wrongdoer's obligation to "make the victim whole".

This principle of accountability runs through all aspects of American law. Doctors who kill and maim patients as a result of medical malpractice are held accountable. Manufacturers who design and market products that can reasonably be expected to cause serious injury to consumers are required to compensate their victims for the damages created by the negligently designed or manufactured product. The same should be true with regard to all

citizens who avail themselves of the privilege of operating a motor vehicle on the highways of our country. Motor vehicles are the single most dangerous nonmilitary instrumentality ever made by mankind. They cause more deaths and injuries each year than any other single device. It is incumbent upon our society to see to it that those who operate motor vehicles do so with the greatest possible care and caution. One of the ways society attempts to encourage such responsible behavior is to impose civil liability on those individuals who carelessly operate vehicles so as to cause injury to others. It is totally antithetical to this important socio-legal concept to say to the drunk driver, for instance, that insofar as the victim is concerned, the drunk has full immunity for the consequences of his irresponsible behavior.

In this regard, the character, scope and nature of a no-fault tort threshold is, perhaps, the most important policy issue a Legislature must address when enacting a no-fault system. This is so because any threshold, regardless of its specific content, creates immunity for those who engage in injurious anti-social behavior. It says to wrongdoers that if a victim is injured but the injury falls short of the threshold, then the guilty party has no accountability to the victim. In essence, the wrongdoer has "been given a free one". Or stated another way, a threshold tells a drunk driver that under our no-fault law, "You may drink and drive and you may injure innocent victims as long as you do not injure them too badly. For it is only if you kill or cripple your victims will you have any responsibility to compensate them for the suffering you have inflicted."

For these reasons, it is vitally important for any no-fault threshold to maintain the proper balance between a system that guarantees adequate economic loss benefits to all accident victims without regard to fault, yet does not exclude seriously injured victims from obtaining compensation for the balance of their damages from the wrongdoers who inflicted that damage. In Michigan, the no-fault tort threshold has maintained that balance for most of its sixteen (16) year existence. The major exception

was the forty-eight (48) month period from 1983 through 1986 which has been characterized by many as the "dark days" of Cassidy v McGovern. In 1987, the Michigan Supreme Court, in the case of DiFranco v Pickard, restored the balance and returned Michigan to its original no-fault tort threshold.

B. A quick look at the historical evolution of the Michigan threshold - from original threshold, to the Cassidy Rule, back to the original threshold (DiFranco).

Michigan's threshold of "serious impairment of body function" remained unchanged by either statute or common law from the date of its enactment in 1973 until the decision of the Michigan Supreme Court in Cassidy v McGovern, 415 Mich 483, which was effective in January of 1983. Until Cassidy was decided, Michigan appellate courts held that the term "serious impairment of body function" should be interpreted by a jury as an issue of fact on a case-by-case basis. This verbal threshold, that existed for the ten (10) year period between 1973 and 1983 was very "effective" in denying many injured victims the right to sue negligent drivers for non-economic loss damages. As an indicator of this, the insurance industry's "All Industry Research Advisory Council" (AIRAC), released a closed claim study in 1982 of all existing no-fault states showing that Michigan had one of the toughest thresholds in the nation. This AIRAC study found that in Michigan, only 6% of all those injured in automobile accidents could legally qualify to pursue a third party tort claim. Therefore, under the Michigan no-fault law, as of 1982, an estimated 94% of injured auto accident victims could not recover non-economic loss damages.

In 1985, the Rand Corporation published its Four Volume Study "Comparing Automobile Accident Compensation Systems". In comparing the effectiveness of all No-Fault thresholds in limiting tort claim filings, the study found Michigan's verbal threshold to be the most restrictive. The study found that the threshold excluded 89-90%

of all injured victims from recovering non-economic damages from the negligent driver.

Further statistical data supporting the fact that the Michigan threshold was in balance prior to Cassidy can be found in a 1985 U.S. Department of Transportation study entitled "Compensating Auto Accident Victims: A Follow-Up Report on Auto Insurance Experiences". This study found that the Michigan No-Fault Act was in balance and had been effective in guaranteeing economic loss benefits while maintaining access to non-economic loss recovery. The important fact about this 1985 DOT study was that it was based upon data accumulated from 1973 to 1982. Therefore, the DOT study was an evaluation of the Michigan threshold as it existed before Cassidy. This DOT study was cited by Professor Jeffrey O'Connell in a law review article that appeared in the February, 1986 edition of the Virginia Law Review. In this article, Professor O'Connell made the following comments at page 66 regarding the federal DOT study and the Michigan threshold:

> "Michigan, for example, has an 'in balance' no-fault law. The Michigan Statute provides for the payment of substantial no-fault benefits: unlimited medical and rehabilitation expenses plus compensation for lost wages of up to $29,000 annually for three (3) years. Michigan victims or their estates can recover tort damages, however, only for death, permanent disfigurement or serious impairment of bodily function. This limitation has reduced tort recoveries by an amount approximately equal to the total payments of no-fault benefits. Accordingly, insurance premiums have remained steady."

"Trends in Auto Bodily Injury Claims", a recent study conducted by the Insurance Research Counsil, further confirms the effectiveness of Michigan's threshold. The study analyzed variations in bodily injury claim frequencies over the 1980-89 period and found "Strong no-fault laws, such as those found in

Michigan and New York, appear to have been successful in limiting bodily injury liability claims and in maintaining those reductions over time". The study found that Michigan had the 49th lowest number of bodily injury claims for every 100 PD claims (6.3) of the 50 states. Only North Dakota had fewer (5.5). The same study conducted in 1993 found Michigan again had the 49th lowest number of bodily injury calaims for every 100 PD claims (8.2). Only North Dakota had fewer (5.6).

In spite of this impressive statistical record confirming the fact that the Michigan no-fault threshold was working effectively and had produced a desirable equilibrium, the Michigan auto insurance industry has unrelentingly pressured the Legislature to further restrict the tort threshold. In 1983, the Michigan Supreme Court accommodated the industry's desires by deciding Cassidy v McGovern. Under the Cassidy decision, the tort threshold was very narrowly defined so as to deny recovery to any accident victim unless the injury was (1) objectively manifested; (2) impaired an important body function; and (3) deprived the victim of the general ability to lead a normal life. Additionally, Cassidy denied accident victims the right to a jury trial on the question of serious impairment of body function, making it a matter of law for the trial judge.

If 94% of injured automobile accident victims were denied the right to sue for damages during the pre-Cassidy threshold era, then it would probably not be far from the truth to conclude that 98% or 99% of Michigan victims were denied recovery under the restrictive Cassidy threshold. During the four (4) years that the Cassidy decision was in effect, auto accident victims were summarily thrown out of court in cases involving very serious injuries. Set forth below are a few examples of "Cassidy Casualties" taken from Michigan Appellate Court cases:

1. Routley v Dault, 140 Mich App 190 (1984), a man who sustained a traumatic inguinal hernia as a result of an automobile collision, who was required to undergo two (2) separate major abdominal surgeries requiring ten (10) days in the hospital, and who was placed under permanent weight lifting restrictions, was held not to have sustained a serious impairment of body function as a matter of law.

2. Kroft v Kines, 154 Mich App 190 (1986), a woman who sustained two (2) severely comminuted fractures of her humerus (upper arm bone), who was hospitalized for three (3) days and who had her arm immobilized in a cast, and who experienced impairment of arm function for several months thereafter, was deemed not to have sustained a serious impairment of body function as a matter of law.

3. Ulery v Coy, 153 Mich App 551 (1986), a woman who sustained a Grade 2 shoulder/collarbone separation with an upward protrusion of the collarbone near the shoulder joint, and who was told by an examining physician that she could not return to work as a waitress unless she successfully underwent corrective surgery to her shoulder, was ruled not to have sustained a serious impairment of body function.

4. Knight v Elliott, Michigan Court of Appeals, Docket No. 86760, decided 2/9/87, a man who suffered permanent brain damage, manifested by prolonged unconsciousness, post-traumatic epilepsy, personality change, memory impairment and double vision; had been diagnosed as suffering a basilar skull fracture, extensive scalp and temporal lacerations, brain swelling, and an injury to one of the nerves supplying the eye was found by a jury not to have suffered a serious impairment of body function, after the jury was instructed in accordance with Cassidy guidelines.

5. Owens v City of Detroit, Michigan Court of Appeals, Docket No. 88944, decided 2/19/87, the trial court ruled on a motion that a man who had injured his eye, requiring 50 stitches and leaving a two-inch scar with permanent drooping and watering of the eye due to internal scarring; and who had lost four front teeth requiring a partial plate causing him trouble talking and eating, did not sustain a serious impairment of body function.

In addition to denying many seriously injured auto accident victims the right to recover non-economic damages from the wrongdoer, the Cassidy threshold precipitated a great deal of legal instability at the appellate court level. During the ten (10) year period of the original no-fault threshold (1973 to 1983) there were approximately only 25 appellate decisions adjudicating issues related to the threshold. This was an average of only 2.5 appellate decisions per year. During the four (4) year period of the "Cassidy experiment" (1983 through 1986), there were approximately 85 appellate decisions dealing with threshold issues. That is an average of about 21.2 appellate decisions per year. Thus, there was far less certainty with regard to the meaning and interpretation of the threshold under Cassidy than there was under the pre-Cassidy threshold.

In December of 1986, the Michigan Supreme Court reversed most of the Cassidy decision in the landmark case of DiFranco v Pickard, 427 Mich 32 (1986). In the DiFranco decision, the Supreme Court resoundingly condemned the Cassidy threshold in unequivocal terms. The Court stated in part:

> "The bottom line is that few plaintiffs have been given the opportunity to recover non-economic damages since Cassidy was decided. . . .The general ability to live a normal life test as applied by the Court of Appeals has proved to be an almost insurmountable obstacle to recovering non-economic damages. Apparently only plaintiffs who are bedridden, cannot care for themselves, or are unable to perform any type of work can satisfy this test. This was not the intent of the Legislature."

The DiFranco decision has fortunately returned Michigan to the original no-fault tort threshold as it existed during the first ten (10) years of the Michigan no-fault experience. Before the ink on DiFranco was barely dry, the auto insurance industry began clamoring for the Michigan Legislature to "overrule" DiFranco and to legislatively codify the oppressive Cassidy threshold.

MODIFIED COMPARATIVE NEGLIGENCE

Changes in the rules of comparative negligence - House Bill 4341 modifies the current law of comparative negligence so as to totally deny any tort recovery to auto accident victims who are more than 50% at fault, even though the defendant (a drunk driver or some other similarly reckless motorist) may be 49% at fault. Michigan currently has a system of "pure comparative negligence" wherein an injured person is entitled to hold a defendant accountable to the extent of the defendant's actual percentage of negligence, whatever that percentage may be. This is a system of pure accountability.